

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

ANDREA L. MILLER,

Plaintiff,

vs.

Case No. 08-CV-271-FHM

MICHAEL J. ASTRUE,
Commissioner, Social Security
Administration,

Defendant.

OPINION AND ORDER

Plaintiff's Motion for Relief Pursuant to Fed. R. Civ. P. 60(b)(6) [Dkt. 28] is before the undersigned United States Magistrate Judge for decision.

Plaintiff seeks an order allowing her attorney to file a motion for an attorney fee award under 42 U.S.C. § 406(b) within 60 days of counsel's receipt of the Notice of Award which calculates the amount of past due benefits owed Plaintiff.

In *McGraw v. Barnhart*, 450 F.3d 493, 496 (10th Cir. 2006), the Court ruled that attorney fees are awardable under 42 U.S.C. § 406(b)(1) when the Social Security Administration awards disability benefits to a claimant following a remand from the federal court. In such a circumstance the authority of Fed. R. Civ. P. 60(b)(6) is employed to allow counsel to seek fees under §406(b)(1) long after the usual fourteen days allotted by Fed. R. Civ. P. 54((d)(2)(B)(i) for filing a motion for attorney fees has expired. *McGraw*, 450 F.3d at 505.

In the present case on May 8, 2009, the Court remanded this case to the Commissioner for further administrative action. [Dkt. 21, 22]. On October 22, 2009 the Commissioner issued a fully favorable decision awarding benefits to Plaintiff. [Dkt. 28-2].

According to Plaintiff, as of the date the instant motion was filed, November 3, 2009, a Notice of Award advising of the amount of past due benefits owed Plaintiff has not been issued.¹ Since an award of fees under §406(b) cannot be calculated until the Notice of Award is issued, and since the date of the decision awarding benefits is the basis for determining whether a motion for fees is timely filed, the request for 60 days after receipt of the Notice of Award in which to file a motion requesting fees is reasonable.

Plaintiff's [Motion] for Relief Pursuant to Fed. R. Civ. P. 60(b)(6) [Dkt. 22] is GRANTED. Counsel's motion for a fee award under 42 U.S.C. § 406(b) must be filed within 60 days of the date the Notice of Award to Plaintiff is issued.

SO ORDERED this 8th day of February, 2010.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

¹ A Notice of Award addressing the benefits of some other Social Security claimant is attached to the motion, probably in error. [Dkt. 28-3].